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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1328

KAISER STEEL CORPORATION,
a Nevada Corporation,
Petitioner,

vs.

W. S. RANCH COMPANY,
a New Mexico Corporation,
Respondent.

AMICUS CURIAE BRIEF OF THE STATE OF NEW MEXICO ON THE RELATION OF THE NEW MEXICO STATE ENGINEER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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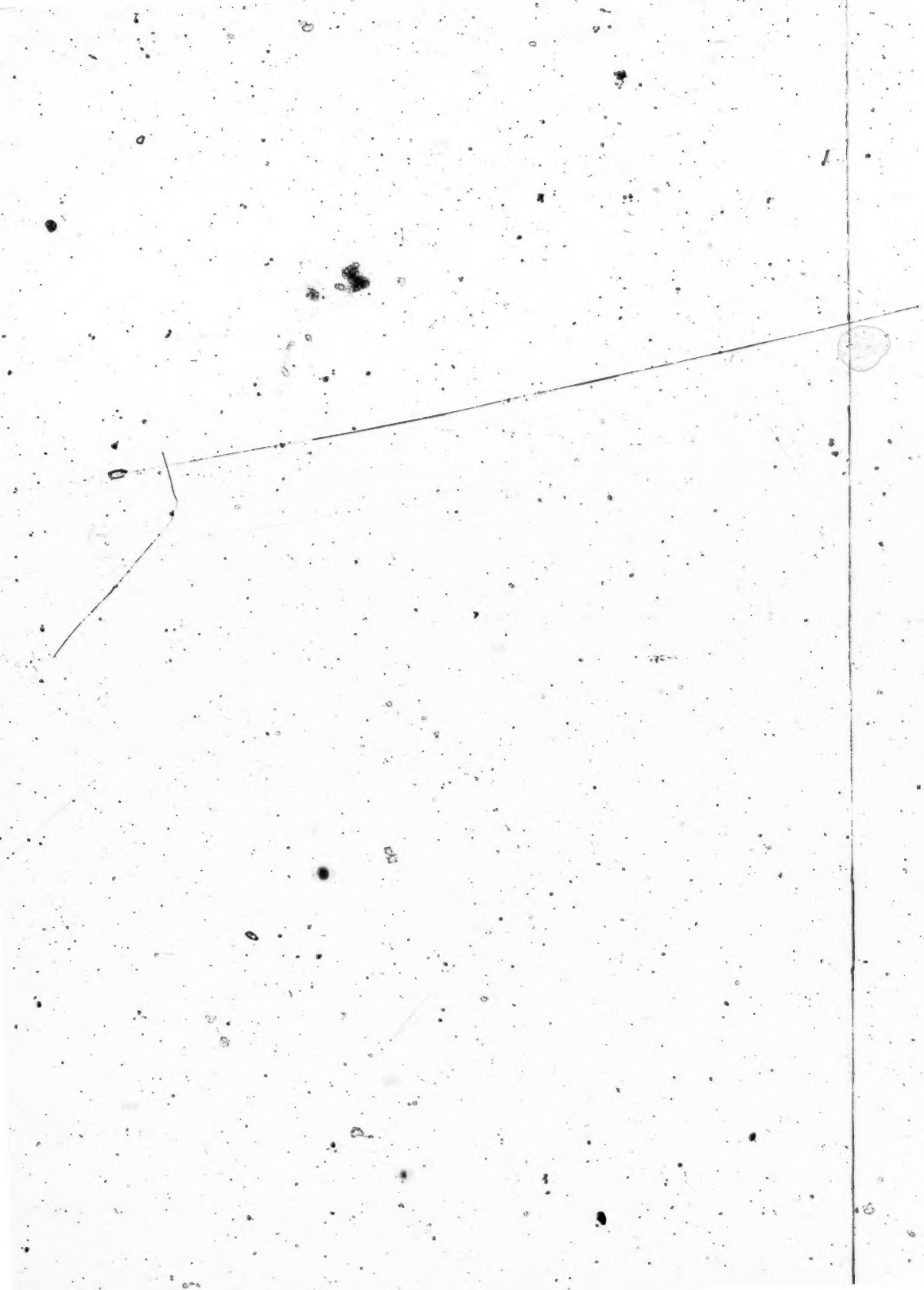

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The State of New Mexico, on the relation of the New Mexico State Engineer, files this, its Brief Amicus Curiae, in support of the Petition for Writ of Certiorari filed herein by the Kaiser Steel Corporation. This brief is submitted pursuant to the authority of Rule 42 of the United States Supreme Court, and particularly Paragraph 4 thereof, permitting the filing of such briefs without consent when the brief is submitted in behalf of a State, sponsored by its Attorney General.

INTEREST OF AMICUS CURIAE

The State of New Mexico supports the Petitioner in its prayer that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on February 1, 1968, denying Petitioner's Motion to Stay Proceedings.

The State of New Mexico has a vital public concern in the interpretation of Section 75-1-3, New Mexico Statutes Annotated, 1953 Compilation, by the United States District Court for the District of New Mexico (Tr. 2, R. 14-19), and the opinion of the United States Court of Appeals, Tenth Circuit (Tr. 4, and reported in 388 F.2d 257). The interest of the State arises out of the impact of the interpretation of New Mexico law by the Federal Courts upon the New Mexico law of eminent domain and the development and distribution of the public waters of the State of New Mexico. The State adopts the "Citations to Opinions Below", "Jurisdiction", "Questions Presented", "Statutes Involved", and "Statement", all as set forth in the Petition for Writ of Certiorari filed herein by Kaiser Steel Corporation. Pursuant to the requirements of Paragraph 5 of Rule 42 of the United States Supreme Court Rules, this brief will include only:

(1) A statement of the interest of the *Amicus Curiae*,
(2) Argument, and
(3) Conclusion.

By Section 75-2-1, N.M.S.A. 1953 Comp., the Relator herein, the New Mexico State Engineer, is designated as the official of the State of New Mexico having general supervision of the waters of the State and of the measurement, appropriation, and distribution thereof. As such, he is the State official most directly concerned with the

application and administration of Chapter 75 of the New Mexico Statutes dealing with water. As the State official appointed by the Governor to supervise the distribution of the waters of the State, he is the representative of the Governor of the State of New Mexico in matters of water rights and administration, and water policy.

REASONS FOR GRANTING THE WRIT

POINT I

It Is Appropriate That the United States Supreme Court Review the Action of the Court of Appeals in Declining to Stay Further Proceedings in Order to Permit New Mexico Courts to First Pass upon an Important Issue of State Law

A. The substantive issue of state law decided by the Court of Appeals and the United States District Court is an issue of vital public concern to the State of New Mexico.

The importance of water in a semi-arid or arid area such as New Mexico need hardly be emphasized, and the interest of the State of New Mexico in the law and mechanics of water distribution is probably self-evident. However, a brief recitation of water supply facts may be helpful in putting the State's interest into perspective.

Precipitation in New Mexico is characterized by wide variability from point to point and from time to time. Annual averages vary from about 8 inches in the desert valleys to about 30 inches in the high mountains. Precipitation at Roswell, for example, which averages 13.53 inches per year, has ranged from a low of 4.35 inches in 1956 to a high of 32.92 inches in 1941. Statewide, the annual precipitation rate is much less than the rate of evaporation from water surfaces.

Precipitation over the State averages about 13 inches a year, for a gross product of roughly 85 million acre-feet.

Of this sum, about 3 million acre-feet appears as run-off in streams. The remainder returns to the atmosphere through evaporation and use by natural vegetation, or percolates into the earth as recharge to underground aquifers which do not discharge to streams within the State.

In addition to net water yield from precipitation within her borders, New Mexico of course receives annually, in a normal water supply period, about 2½ million acre-feet of stream flow from Colorado via the San Juan River and Rio Grande, and about 2,000 acre-feet from Arizona via the San Francisco River. Between the inflow to the State and the in-state surface-water yield, about 2 million acre-feet is used up in New Mexico and approximately 3½ million acre-feet is discharged to downstream States. While New Mexico is entitled to increase its present uses of water in some stream systems (the San Juan River and the Canadian River) under Interstate Compacts and court decrees in equitable apportionment suits, in most parts of the State there are presently existing more water rights than the safe annual yield of New Mexico's rivers and streams will regularly satisfy.

Even a casual glance at the map of New Mexico will demonstrate that streams with perennial flows are widely separated by vast intervening areas of dry land which must rely for water, to the extent it is available, upon the amounts of water in underground storage. Here again, many of the areas of the State relying upon groundwater for survival are withdrawing this irreplaceable resource at a rate exceeding its renewal by natural recharge through precipitation. In some areas no development is possible due to the absence, scarcity or poor quality of underground water. In most areas of the State, the total annual safe yield of the streams has been appropriated for many years,

and new development has relied upon the transfer of waters and water rights from existing historical uses to the proposed new uses.

Speaking generally, competition among various types of use in New Mexico has not yet become intense; such competition has not yet reached its peak because the industrialization and urbanization which the experts anticipate for New Mexico are just beginning. In 1950 our population was 681,000. In 1960 our population was 951,000, and experts of the Bureau of Business Research of the University of New Mexico predict that our population will increase to about 2¼ million by 1980. Whether or not these increases will occur depends, of course, on a number of factors, including the manner in which we manage our water resources and our ability to redistribute our limited resource among the competing demands.

The State's water program reflects a recognition of the need for the development of water for agricultural, municipal *and* industrial use, with attention to growing needs of water-related recreation. In some areas of the State, such as the San Juan and Canadian River valleys, current plans for the development of presently unused waters should meet the growing municipal and industrial needs. In other areas of the State, growing municipal and industrial needs can be met only by acquiring water rights presently being exercised for irrigation and transferring them to the new uses, usually with the concurrent necessity of physically transporting the water to the locale of use. In some instances the transfer can be accomplished by relocating the point of diversion or by relocating wells. In other instances, the lack of physical access to surface or groundwaters of suitable quantity or quality is such that the legal transfer of waters and water rights can be implemented only by means of conveyance of the resource

from those points where it is available to those points where it must be used.

There are, even today, numerous instances in which the physical transportation of water has been or will be an essential prerequisite to its application or continued application to beneficial use. Among these are the following:

1. Large-scale secondary recovery projects for the production of oil in southeast New Mexico, requiring the conveyance of water for injection.

2. Electric power generation from thermal plants in the Four Corners area of New Mexico, requiring the diversion of the surface waters of the San Juan River through pipelines to the plant sites.

3. The now-under-construction facilities of the Phelps Dodge Corporation in the southwestern portion of the State of New Mexico require the conveyance of water by means of pipeline for a distance of several miles, by reason of the unavailability of usable groundwaters in the vicinity of the multi-million-dollar milling operation.

A further example of the importance to the State of distribution of water may be found in the southwestern portion of the State. By virtue of the decision of the United States Supreme Court in *Arizona* v. *California*, 373 U.S. 546 (1963), an absolute upper limit on the total use of waters, both surface and underground, within a vast region of southwestern New Mexico is established by decree of the Court. No new uses of water in excess of these limitations may be initiated for any purpose within the area drained by the Gila and San Francisco stream systems, including their underground tributary sources.

By way of partial accommodation to this strict limitation on development, the State of New Mexico has negotiated with its sister State, Arizona, an agreement hope-

fully to be implemented by now-pending Federal legislation authorizing the Central Arizona Project and Hooker Dam and Reservoir in New Mexico. Representative of this legislation is HR 3300, recently reported out by the Committee on Interior and Insular Affairs of the United States House of Representatives. This Bill would ultimately permit additional consumptive uses of water in New Mexico in the amount of 48,000 acre-feet per year. Because of the limitations imposed by the decree in *Arizona* v. *California, supra,* and the unavailability of usable groundwater sources in much of the area of the Gila and San Francisco River systems, the ultimate utilization of this last available water supply will depend in large part upon the ability of those contracting for such waters with the Secretary of the Interior physically to convey the water to the sites where it will be used. Similar circumstances will prevail in connection with other Federal projects (Navajo Dam) and State reservoirs (Ute Dam).

Perhaps the current importance of Section 75-1-3, New Mexico Statutes Annotated, 1953 Comp., to the State of New Mexico can best be exemplified by reference to a "Memorandum" written by S. E. Reynolds, State Engineer for the State of New Mexico, on February 15, 1965. This memorandum, attached as Appendix A to this brief, was written on the subject of then-pending State legislation introduced in the House of Representatives of the New Mexico State Legislature during its regular session in 1965. The subject memorandum (Appendix A) was conveyed to the chairman of the House Judiciary Committee and the Chairman of the House Agriculture Committee by memorandum dated February 15, 1965, submitted in the name of S. E. Reynolds, State Engineer. The submittal memorandum is attached hereto as Appendix B to this brief. The subject legislation, which died in committee, sought to

> "strip private persons and corporations of this right [eminent domain] and reserve the power of condemnation for water storage and conveyance works to public bodies." (See Appendix A.)

It might be argued that the subject statute, whatever its importance may have been in the pioneer irrigation economy of New Mexico, is no longer a vital factor in the New Mexico scheme of water development and distribution. The above-mentioned memorandum negates this conclusion. It is stated therein (Appendix A):

> "This granting of the power of eminent domain to private individuals and corporations recognizes that the development, distribution and use of water is vital to the economy and the public welfare in arid and semi-arid states. . . . Even under present circumstances, the provisions of Section 75-1-3 can have an extremely important effect on the growing economy of the State. The statute in its present form in effect guarantees private persons and private corporations access to water with payment for damages as assessed by the Court if condemnation is necessary. If this guarantee is removed by the enactment of House Bill No. 249, perverse or curmudgeonly landowners could thwart development of our natural resources and industrial or agricultural enterprises to the detriment of the public interest in New Mexico."

It is also worthy of note that this expression of policy by the New Mexico State Engineer is entirely consistent with the total equality of *all* beneficial uses of the public water confirmed by the statutory and constitutional provisions governing water law in New Mexico.

It should be apparent that the State of New Mexico indeed has a vital public interest and concern with the manner of distribution of its finite supply of water in order that the public benefits to be derived from its use for the purposes of the future can be implemented.

B. The Court of Appeals has decided an important State question in a manner which may be or is in conflict with applicable State law.

The State believes that the Court of Appeals' decision that New Mexico law does not grant Petitioner the right to exercise the power of eminent domain to transport waters for beneficial use is erroneous.

As expressed by the "Motion of State of New Mexico on the Relation of the State Engineer for Leave to File Its Brief *Amicus Curiae*", filed in the United States Court of Appeals, Tenth Circuit, following the entry of the decision of that Court, it is the position of the State of New Mexico that:

> "New Mexico law grants the power of eminent domain for the purpose of diverting and conveying water under a valid water right across the lands of others, for application to beneficial use, and the taking of private property for such purposes is a taking for 'public purposes' under New Mexico law; . . . ." (Tr. 8).

The concern of the State arises from the fact that the decision of the Court of Appeals has decided an important State question in a manner which may be in conflict with applicable State law, and which we feel is clearly contrary to the policy of the State of New Mexico as expressed through its comprehensive code of water laws, its underlying Constitutional foundation, and its unified scheme of regulation and development of water resources. This legal and institutional framework has been developed over a period of time exceeding in duration the existence of the State of New Mexico itself. It may be inappropriate to suggest here that the State supports the view of New Mexico law expressed by the United States District Court for the District of New Mexico in its opinion below (Tr. 2, R. 14-19). However, it cannot be inappropriate

for the State to declare its interest in having this most important issue of State law and State Constitutional construction resolved in the first instance by the Courts of the State of New Mexico.

While we must concede as a matter of law that the issue of State law is unclear and difficult to resolve, we feel compelled to note that, in the view of *Amicus Curiae*, the "Memorandum Opinion" of the United States District Court herein represents a complete and accurate statement of the New Mexico law on the subject issue. The applicable statutes and decisions of the New Mexico Supreme Court have been fully discussed in the briefs below, and in the Petition for Writ of Certiorari filed herein. However, the equivalence of "beneficial use" and "public use" under New Mexico law seems to be so clearly demonstrated by the applicable Constitutional provisions that we set them forth at this point in full:

ARTICLE XVI, NEW MEXICO CONSTITUTION

"Section 1.

"All existing rights to the use of any waters in this State for any useful or beneficial purpose are hereby recognized and confirmed.

"Section 2.

"The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the State. Priority of appropriation shall give the better right.

"Section 3.

"Beneficial use shall be the basis, the measure and the limit of the right to the use of water."

In the interest of brevity, we will not restate the arguments presented in the Petition for Writ of Certiorari. The State adopts the "Reasons for Granting the Writ" expressed therein.

CONCLUSION

For the foregoing reasons, and those expressed in the Petition herein, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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